Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

JIM GUY TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the provision of 28 U.S.C. § 2244, requiring permission from the Court of Appeals to file a successive petition under 28 U.S.C. § 2255, applies to Rule 60(b) motions to vacate judgments and, if so, whether this provision is applicable when the appeal of the original § 2255 denial is still pending.

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The order of the Court of Appeals for the Eighth Circuit at issue in this case was entered on April 12, 2004 (App. A). It is not published. The unpublished district court order was filed on August 29, 2003 (App. B).

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254. The opinion of the court of appeals was issued on April 12, 2004.

STATUTORY PROVISIONS AND RULE INVOLVED

28 U.S.C. § 2244:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

28 U.S.C. § 2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without

jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Rule 60, Federal Rules of Civil Procedure:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or

it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

This case presents the questions of whether a motion under Rule 60(b) FRCP to vacate the denial of relief under 28 U.S.C. § 2255 is governed by the "gatekeeper" provisions of 28 U.S.C. § 2244, and, if so, whether the provision is applicable when the appeal of the § 2255 denial has not been decided.

On June 7, 1995, a grand jury in the Eastern District of Arkansas under the direction of Independent Counsel (OIC) Kenneth Starr indicted Tucker, then the Governor of

Arkansas, his former tax attorney John Haley and Tucker's former business associate William Marks on a charge of conspiracy to impede the calculation and collection of income taxes, a so-called *Klein* conspiracy, based on *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924, 78 S. Ct. 365 (1958). Tucker and Marks were also indicted on two non-tax counts.

In August, 1995, the indictment was dismissed by U.S. District Judge Henry Woods. This Court reinstated the indictment and disqualified Judge Woods. *United States v. Tucker*, 78 F.3d 1313 (8th Cir. 1996) [*Tucker I*]. Upon remand, the case was assigned to District Judge Stephen M. Reasoner.

The *Klein* conspiracy count, Count 3, essentially alleged that between October, 1987, and October, 1990, Tucker conspired to obstruct and impede the IRS by engaging in a series of transactions in order to impede the IRS in determining the amount of corporate taxes which otherwise would have been due on the sale of various cable TV systems. The OIC asserted that there had been a tax loss in excess of $3.8 million. It was the avoidance of this very large amount which was alleged to be both the motivation for, and the result of, the alleged conspiracy. The indictment did not allege the identity of the taxpayer alleged to owe the tax, the statutory basis for the calculation of the tax, or the tax law which was the object of the alleged conspiracy.

Tucker had believed that the transactions were legitimate. Before these transactions, Congress had amended Section 1374 of the Internal Revenue Code, 26 U.S.C. § 1374, with the amendments to be effective January 1, 1987. The transactions had been organized under the belief that

the new Section 1374 would govern them. But the indictment was written in a way that made it impossible to determine what tax law had given rise to the claim of a conspiracy to impede a tax determination or collection or which entity's taxes were at issue. The indictment certainly did not put Tucker on notice that the indictment was based on the assumption that the conspiracy was intended to impede the collection of a tax that had been repealed.

Thus in a motion and brief for bill of particulars filed January 8, 1998, Tucker asked "which entity's or person's income tax is at issue and the year for which such tax is owed." On February 5, 1998, a hearing was held on the motion. The OIC convinced the district court that the identity of the entity whose taxes were purportedly impeded was "irrelevant." Disclosure of the information clearly would have led to Tucker's ascertainment that he was charged with conspiring to impede the IRS in the collection of a repealed tax. That, in turn, necessarily would have resulted in the OIC having to admit that the indictment was based on a misrepresentation of both the applicable tax law applicable and the alleged loss to the government.

The Court's ruling could not be the subject of an interlocutory appeal. As a result, Tucker was confronted with an imminent trial in which he had been denied information vital for his defense. Because of the alleged loss of over $3.5 million, a conviction would have triggered mandatory imprisonment of probably 41 to 51 months under the United States Sentencing Guidelines. Tucker was still in recovery from years of liver disease and from a liver transplant barely one year earlier. He was under heavy medication. Tucker was offered a plea agreement which would avoid the risk of imprisonment and the consequent difficulties in obtaining

proper medical treatment. Thus, on February 20, 1998, although not knowing the specifics of the allegations, Tucker entered a plea of guilty to Count 3, the *Klein* conspiracy. The other two counts were dismissed.

The admissions forming the basis on which Tucker entered his plea on February 20, 1998, were minimal, and, particularly considering the later revelations, insufficient to sustain a conviction. He said he had acted on advice of counsel. (R. 11, 2/20/98 hearing) He also said that he had agreed "to not disclose the contract of sale in the disclosure statement to the bankruptcy court . . . and one of the purposes of the bankruptcy was to deal with tax issues." He stated that he did not agree with much of the OIC's recitation. (R. 25)

Tucker did not state that the September 1987 contract involving the sale was concealed from the IRS. Indeed, he has specifically asserted that it was disclosed to the IRS during an audit of the transaction in the early 1990s, and the government had not denied that assertion. At the time of the plea, Tucker did not know, and indeed could not have known, that the indictment alleged a conspiracy to impede the determination and collection of a tax repealed more than one year prior to the taxable transaction. Tucker could not have known that the OIC had made legal and factual misrepresentations to the grand jury in order to obtain the indictment.

It was months after his plea that Tucker first learned that the OIC possibly had based its case on a theory that Tucker had violated Old Section 1374. Tucker then filed a Motion for Declaration of Applicable Law in connection with the restitution proceeding in another effort to discover

specifically the tax law which was purportedly the object of the alleged conspiracy and to declare: (i) that Section 1374 as amended in 1986 ("New Section 1374") was the applicable law; (ii) that Old Section 1374 had been repealed prior to the transactions at issue; and (iii) that the OIC had no basis for asserting the applicability of the Old Section 1374. As of that date, at the latest, the OIC was on notice of its potential error. Had the OIC investigated and admitted its error at that time, Tucker could have moved to withdraw his plea then.

The OIC responded to the Motion for Declaration of Applicable Law on September 18, 1998 and for the first time formally disclosed to Tucker and the Court that the loss alleged, and the calculation in the indictment, was based upon a conspiracy to impede the IRS from determining and collecting a tax otherwise due under Old Section 1374. But the OIC asserted that it was Tucker who was wrong about the law. The OIC made two arguments — both of which have now been recanted by the government: (i) that the 1986 amendments did not cover "S" corporations created prior to January 1, 1987 (such as Tucker's) and (ii) that it was only the 1988 amendments to Section 1374 that did bring such corporations within the coverage of the 1986 enactment.

The district court relied on the representations of the OIC and declared Old Section 1374 to be the law applicable at the time of the transaction Tucker was sentenced to four years probation, a fine of $6,000.00, a $50.00 special assessment and, based on Old Section 1374, $1,000,000.00 in restitution.

Tucker appealed the restitution order on the basis that Old Section 1374 had been repealed prior to the acts of the alleged conspiracy and was inapplicable. The OIC continued to assert the applicability of Old Section 1374.

In the meantime, at Tucker's request, the IRS began normal administrative proceedings to review the transaction, the applicable tax law and the corporate tax owed, if any. Since the case had not been initiated by either the IRS or the Department of Justice, that analysis previously had been made only by the OIC and its staff, which included certain IRS agents assigned to the OIC's supervision.

On July 3, 2000, the Eighth Circuit reversed the district court. *United States v. Tucker*, 217 F.3d 960 (8th Cir. 2000) [*Tucker II*]. The Court left the issue of the applicable law in doubt. Although it agreed that Old Section 1374 may have been repealed, it did not comment on whether such appeal was a result of the 1986 Act or its subsequent 1988 amendments (or, even later regulations proposed in 1994 and finalized in 1996 implementing the 1986 amendments). It found that the district court had failed to give the OIC a chance to present any testimony in support of its position that Old Section 1374 was the governing law. The Court then directed that the OIC be offered an opportunity to present testimony from a "responsible official" of the IRS that Old Section 1374 would have been applied to the transaction by the IRS or alternatively, to present some other legal theory. The Court even suggested an alternative legal theory, perhaps assuming that the grand jury might have been presented such a scenario. Thus, Tucker was still left in doubt as to the government's theory of the object of the conspiracy alleged or the basis for the tax loss asserted.

Following that ruling the district court set a hearing for December 1, 2000, to allow the OIC to present testimony from an "appropriate official of the IRS" as to the applicable law. A few months prior to that hearing, the OIC learned that the IRS had made an internal preliminary determination that

the 1986 law governed the transaction. The OIC sought to halt any further administrative proceedings by the IRS on the grounds that the case against Tucker was still "under prosecution."

On December 1, 2000, Hickman Ewing of the OIC appeared and asserted that the OIC first began to question the accuracy of its legal interpretation after Tucker was sentenced. ". . . once Mr. Tucker pled guilty and was sentenced, we had a question about what law applies" (R. 13) This had not been previously disclosed to Tucker or to the Court. Ewing then admitted that in the week after October 2, 2000, he had received from "someone in the IRS" a copy of a letter from the examining agent concluding that the "new law" applies. Ewing admitted that he had not supplied that letter to Tucker pursuant to Tucker's request for materials encompassed by *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). (R. 16)

The district court said that it lacked jurisdiction to order the IRS to make a determination, but that it would not enter a new restitution order until such as time as the IRS did make such a determination. An agreement was then reached in which the OIC agreed to halt its efforts to suppress a ruling by the IRS, and Tucker agreed to and did permit the OIC to submit evidence and argue its case for the application of Old Section 1374 at a hearing before an IRS case officer. The OIC appeared before the IRS case officer on March 6, 2001, with counsel for Tucker present and argued specifically and only that Old Section 1374 was the governing law at the time of the transactions and in the tax year at issue and that the loss at issue was a loss under Old Section 1374.

On May 23, 2002, the IRS case officer issued a notice of proposed deficiency which rejected the OIC's arguments as to the application of Old Section 1374 and finding the transaction governed by New Section 1374, as amended by the Tax Reform Act of 1986 and in effect January 1, 1987. Thus May 23, 2002, was the first date on which the IRS has announced an opinion on the tax law applicable to the transactions at issue, and was the first date on which Tucker had been advised that his understanding of the tax law had been correct all along.

On February 24, 2003 , while the matter was still in IRS administrative proceedings and the restitution issue still pending on the docket of the district court, Tucker filed a petition for relief under 28 U.S.C. § 2255 alleging:

- That the IRS's conclusion that Old Section 1374 was inapplicable to the transaction meant that the conspiracy alleged in the indictment was legally impossible, and therefore that Tucker was both factually and legally innocent of the conspiracy, and thus that his conviction violated Fifth Amendment due process guarantees.

- That the OIC committed a *Brady* violation by its refusal to disclose the theory — later demonstrated to be false and based on a law later shown to have been repealed — under which the indictment was obtained and the prosecution pursued.

- That because of the failure to provide proper notice of the true nature of the charge, Tucker's plea of guilty was not knowing and intelligent, a ground for relief cognizable under the doctrine expressed in

Bousley v. United States, 523 U.S. 614, 118 S. Ct. 1604 (1998). In reply to the government's response, he also noted a Sixth Amendment ineffective counsel issue.

- That although there was no default of this claim, any default of the foregoing claims is excused by the cause and prejudice test or the actual innocence test. These provide a gateway for Tucker's substantive claims to be heard on their merits.

At this point, for the first time, the Department of Justice entered the case and filed a response stating that the petition was unripe; that the claim was procedurally defaulted; that a *Klein* conspiracy did not require knowledge about the tax consequences; that there was no *Brady* violation and that the guilty plea was voluntarily and intelligently entered.

In its ruling against Tucker on his § 2255 petition, the district court found that the extraordinary circumstances of the case rendered the petition timely; that the claims were procedurally defaulted; and that under *Klein* conspiracy doctrine Tucker could not be actually innocent because, the Court opined, knowledge of the correct law was not necessary to complete a *Klein* conspiracy. However, the district court misapprehended Tucker's argument when it referred to Tucker relying on a "1986 amendment and a 1988 amendment to 26 U.S.C. § 1374" (Op. p. 9). This misapprehension enabled the district court to say that Tucker's complaint could bear solely on restitution. The Court's order implicitly accepted the government's assertion—now recanted— in its response to Tucker's § 2255 petition that Tucker was relying on "certain changes to the tax code enacted after his crime, but which were retroactive under certain circumstances" (Resp. p. 2)

The district court had also held that Tucker's claim was procedurally defaulted because "the government's theory of the case was known to defendant at least by the time his plea hearing was concluded. This forecloses any claim that the alleged *Brady* violation caused him not to raise the issue by way of motion to set aside his plea and/or in his appeal" (Op. p. 5) Although the government argued that the law was available to Tucker and he could have figured out OIC's error earlier, the government itself admits that it did not figure out the OIC's error until years later. The fact is that both the Independent Counsel for many years, and initially the Department of Justice, misstated the applicable law to Tucker, the district court and the Eighth Circuit. In *Banks v. Dretke*, __ U.S. __, 124 S. Ct. 1256 (2004), for purposes of cause for procedural default, a defendant is entitled to rely on the representations of the prosecution.

The district court erred perhaps because as late as the summer of 2003 when it responded to Tucker's § 2255 pleading, the government itself was still supporting the OIC position that Old Section 1374 law did govern Tucker's transaction, and that it was only the 1988 amendments that caused a reduced tax consequence. Thus, neither at the sentencing hearing nor during the briefing of the § 2255 petition did the district court itself yet have "notice" that the OIC had used a repealed tax statute to indict and prosecute Tucker.

At the same time that it denied the § 2255 petition, the district court scheduled a hearing on the restitution issue for December 10, 2003. In the § 2255 action, Tucker sought and was granted a certificate of appealability and proceeded with the appellate process. Tucker and the government then informed the court of appeals of the scheduling of this hearing

and of the possibility that information pertinent to the appeal might be developed. The Eighth Circuit then held the appeal in abeyance.

On September 30, 2003, the government filed a document entitled Government's Notice of Intent to Rely on Alternative Theory for Sentencing. In that pleading, the government finally admitted that New Section 1374 was applicable. This admission was reiterated in a stipulation filed on December 9, 2003.

At the hearing on December 10, 2003, the government also stipulated that the maximum possible corporate tax loss to the government would be $125,429.88. It did not contest that Tucker might actually get a net refund. The admission stands in stark contrast to the alleged $3.5 million of losses and multiple previous assertions of the OIC and then the Department of Justice that Tucker was simply relying on changes to the tax code "enacted after his crime."

On March 19, 2004, Tucker filed a Motion under 28 U.S.C. § 2244 for Permission to File Rule 60 Motion in district court. Tucker included in an appendix the proposed Rule 60 filing. In his Motion for Permission, Tucker pointed out that:

> This court of appeals has held that Rule 60 motions generally are to be deemed the equivalent of successive petitions and subject to the gatekeeping requirements of 28 U.S.C. § 2244. *Boyd v. United States*, 304 F.3d 813 (8th Cir. 2002).

28 U.S.C. § 2255 provides in pertinent part with regard to successive petitions — to which category this Court has assigned Rule 60 motions —

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain —
>
> > (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; . . . .

Tucker takes the position that the interests protected by 28 U.S.C. § 2244 and Rule 60 are not necessarily the same. The former is concerned with the integrity of the original criminal prosecution, whereas the latter deals with the integrity of the § 2255 process. Therefore, he asserts that even if he were deemed not to meet the § 2244 criteria, he is still entitled to relief under Rule 60 because of the incursion on the integrity of the court and the judicial process that Rule 60 is to rectify. Moreover, since there has been no appellate adjudication yet of the denial of § 2255 relief, the precedential concerns motivating § 2244 have not yet ripened.

Therefore, the issues presented to this Court had been presented to the court of appeals.

Although the government did not oppose Tucker's motion, on April 12, 2004, the court of appeals denied Tucker's motion and ordered the appeal process to continue. The court of appeals denied a stay of briefing in order to seek certiorari. As of this writing, Tucker has filed his opening brief.

REASONS FOR GRANTING THE PETITION

The Court Should Grant Certiorari To Decide Whether And Under What Circumstances Motions Under Rule 60 FRCP Are Subject To The Gatekeeper Provisions Of 28 U.S.C. § 2244

This Court should grant certiorari to determine whether the restrictions on filing of successor petitions found in 28 U.S.C. § 2244 apply to motions filed under Rule 60(b), FRCP. This Court granted certiorari in a similar situation in *Abdur'Rahman v. Bell*, 535 U.S. 1016, 122 S. Ct. 1605 (2002), but then dismissed the petition as improvidently granted. *Abdur'Rahman v. Bell*, 537 U.S. 88, 123 S. Ct. 594 (2003).

This is an issue which must be clarified and decided by this Court. The texts of the relevant statutes— 28 U.S.C. §§ 2244, 2255 and 2254 (this dealing with state prisoners) — do not mention Rule 60. The circuits are split in several different directions. The Eighth Circuit takes the position, for example in *Boyd v. United States*, 304 F.3d 813 (8th Cir. 2002), that Rule 60(b) motions, whether from §§ 2255 or 2254 proceedings, are subject to the gatekeeper requirement of § 2244. Other circuits have generally agreed. *See, e.g.*, *Landano v. Rafferty*, 897 F.2d 661 (3d Cir. 1990); *United States v. Rich*, 141 F.3d 550 (5th Cir. 1998); *McQueen v.*

Scroggy, 99 F.3d 1302 (6th Cir. 1996); *Burris v. Parke*, 130 F.3d 782 (7th Cir. 1997); *Lopez v. Douglas*, 141 F.3d 974 (10th Cir. 1998); *Mobley v. Head*, 306 F.3d 1096, 1096 (11th Cir. 2002).

However, at least one other circuit has disagreed. *Rodriguez v. Mitchell*, 252 F.3d 191 (2d Cir. 2001). The Ninth Circuit has set forth a general rule agreeing that § 2244 is generally applicable, but has posited certain possible exceptions for fraud. *Thompson v. Calderon*, 151 F.3d 918 (9th Cir. 1998). *Ortiz v. Mitchell*, 195 F.3d 520 (9th Cir. 1999). *See also United States v. MacDonald*, 161 F.3d 4, 1998 WL 637184 (4th Cir. 1998), *unpublished disposition*. At least one other circuit posits a case-by-case rule. *Rodwell v. Pepe*, 324 F.3d 66 (1st Cir. 2003).

Justice Stevens' dissent from denial of certiorari in *Abdur'Rahman* explains, quoting from the dissent of Judge Tjoflat in *Mobley v. Head*, *supra*:

> As Judge Tjoflat explained in a recent opinion addressing that precise issue, the difference is defined by the relief that the applicant seeks. Is he seeking relief from a federal court's final order entered in a habeas proceeding on one or more of the grounds set forth in Rule 60(b), or is he seeking relief from a state court's judgment of conviction on the basis of a new constitutional claim? Referring to the difference between a Rule 60(b) motion and a "second or successive" habeas corpus petition, Judge Tjoflat wrote:
>
> > The distinction lies in the harm each is designed to cure. A 'second or successive'

habeas corpus petition, as discussed above, is meant to address two specific types of constitutional claims by prisoners: (1) claims that 'rel[y] on a new rule of constitutional law,' and (2) claims that rely on a rule of constitutional law and are based on evidence that 'could not have been discovered previously through the exercise of due diligence' and would establish the petitioner's factual innocence. 28 U.S.C. § 2244(b)(3)(A). Neither of these types of claims challenges the district court's previous denial of relief under 28 U.S.C. § 2254. Instead, each alleges that the contextual circumstances of the proceeding have changed so much that the petitioner's conviction or sentence now runs afoul of the Constitution.

In contrast, a motion for relief under Rule 60 of the Federal Rules of Civil Procedure contests the integrity of the proceeding that resulted in the district court's judgment.

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When a habeas corpus petitioner moves for relief under, for example, Rule 60(b)(3), he is impugning the integrity of the district court's judgment rejecting his petition on the ground that the State obtained the judgment by fraud. Asserting this claim is quite different from contending, as the petitioner would in a successive habeas corpus petition, that his conviction or sentence was obtained 'in

violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2254(a).

In sum, a 'second or successive' habeas corpus petition, like all habeas corpus petitions, is meant to remedy constitutional violations (albeit ones which arise out of facts discovered or laws evolved after an initial habeas corpus proceeding), while a Rule 60(b) motion is designed to cure procedural violations in an earlier proceeding — here, a habeas corpus proceeding — that raise questions about that proceeding's integrity.

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As a final note, I would add that this rule is not just consistent with case law, but it also comports with the fair and equitable administration of justice. If, for example, a death row inmate could show that the State indeed committed fraud upon the district court during his habeas corpus proceeding, it would be a miscarriage of justice if we turned a blind eye to such abuse of the judicial process. Nevertheless, this is the result that would occur if habeas corpus petitioners' Rule 60(b) motions were always considered 'second or successive' habeas corpus petitions. After all, a claim of prosecutorial fraud does not rely on 'a new rule of constitutional law' and may not 'establish by clear and convincing evidence that . . . no reasonable factfinder would have found the applicant guilty of

> the underlying offense.' 28 U.S.C. § 2244(b)(2). It is a claim that nonetheless must be recognized.
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> *Mobley v. Head*, 306 F.3d 1096, 1100-1105 (C.A.11 2002) (dissenting opinion). Judge Tjoflat's reasoning is fully consistent with this Court's decisions in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998), and *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

537 U.S. at 94-96, 123 S. Ct. at 597-98.

By requiring Tucker to go before a circuit panel, where he was denied, the Eighth Circuit has deprived Tucker of the right to pursue a meritorious Rule 60 motion, one that fits the long-established criteria for Rule 60 relief. His original claim, for which the Rule 60 motion is applicable, alleged that his conviction and sentence violates constitutional principles of due process as guaranteed by the Fifth Amendment. [He also alleged a Sixth Amendment ineffective counsel violation.]

Although § 2244 prohibits certiorari petitions from the denial, that prohibition cannot affect this Court's determination of whether the § 2244 ban even applies here. *Castro v. United States*, __ U.S. __, 124 S. Ct. 786 (2003).

However this Court rules on the overall interrelationship between § 2244 and Rule 60, the Eighth Circuit's rule applying § 2244 to cases pending on direct appeal appears to contradict this Court's holding. In *Stone v. I.N.S.*, 514 U.S. 386, 115 S. Ct. 1537 (1995), this Court held in dicta that:

> A litigant faced with an unfavorable district court judgment must appeal that judgment within

> the time allotted by Federal Rule of Appellate Procedure 4, whether or not the litigant first files a Rule 60(b) motion (where the Rule 60 motion is filed more than 10 days following judgment). Either before or after filing his appeal, the litigant may also file a Rule 60(b) motion for relief with the district court. The denial of the motion is appealable as a separate final order, and if the original appeal is still pending it would seem that the court of appeals can consolidate the proceedings.

514 U.S. at 401, 115 S. Ct. at 1547

Tucker has been prejudiced by his inability to pursue a Rule 60 motion. Tucker should entitled to pursue relief under several different portions of Rule 60(b). The decision denying § 2255 relief was a mistake under 60(b)(1). The *admission* of the government that the prosecution misrepresented the applicable law to Tucker and the courts, and denied that misrepresentation until late 2003 is newly discovered evidence which Tucker had been diligently seeking for years, but which was only recently made, and is cognizable under Rule 60(b)(3). The longtime assertion that Old Section 1374 was applicable clearly may be denominated a fraud or misrepresentation of the adverse party. Rule 60(b)(5). This also falls within Rule 60(b)(6), the catchall other reasons: The government's renunciation of a longheld position on the crucial issue in the case taints the entire earlier proceedings. But perhaps a more fundamental point is that confidence in the ultimate result and in the judicial process has been undermined by the events of this case.

The government's explicit admission that Old Section 1374 is not applicable to the transaction, and that New Section 1374 as effective January 1, 1987, was applicable at the time of the transactions, and that the maximum corporate tax loss possible was not over $3.5 million but at most, no more than $125,500 (before reductions arising from a reduction in Tucker's personal tax) is new evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the Tucker guilty of the offense. That is true in particular for these reasons: In light of the evidence as a whole, a grand jury would not have indicted Tucker if there had not been misrepresentations of law and fact to the grand jury. Had this information been disclosed before trial, Tucker might have been entitled to dismissal of the indictment for governmental misconduct under the doctrine enunciated in *Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S. Ct. 2369 (1988), and which is grounded in Fifth Amendment due process and Rule 52, F.R. Crim. P. If the Independent Counsel had properly disclosed its misrepresentation to the grand jury as to the object and consequences of the conspiracy, Tucker would not have entered a plea of guilty. Had the prosecution's use of a repealed tax law and a loss calculation under the law been properly disclosed, no reasonable jury would have convicted Tucker.

The facts of this case present the circumstances contemplated by the equitable considerations contemplated by Rule 60. Tucker should be allowed to present his Rule 60 claim to the district court, but was forced by circuit precedent to seek permission, although the texts of §§ 2244 and 2255 are silent on such a requirement. This Court should grant

certiorari to decide the interrelationship of 28 U.S.C. § 2244 and Rule 60, and upon plenary argument should hold that Rule 60 motions are not subject to § 2244, particularly when they precede the determination of the original case on appeal.

CONCLUSION

Tucker respectfully prays that this Court grant certiorari, and that upon plenary briefing and argument, this Court hold that the provisions of 28 U.S.C. § 2244 requiring permission of the court of appeals to file a successive petition do not apply to motions under Rule 60, FRCP.

Respectfully submitted,

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